UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES	)	
	)	
v.	)	**CAUSE NO. 5:14CR02114-001-RB**
	)	
RUBEN CANTU	)	**Evidentiary Hearing Requested**

DEFENDANT RUBEN CANTU'S AMENDED MOTION TO SUPPRESS

I. INTRODUCTION

Defendant RUBEN CANTU (hereinafter "Mr. CANTU") hereby files this amended motion to suppress and requests that the Court set it for an evidentiary hearing. Mr. Cantu moves to suppress all evidence seized as a result of the illegal search, seizure and identification on March 5, 2014, as well as all other evidence subsequently discovered. This evidence was seized by the United States Government in violation of the defendant's Fourth Amendment right to be free of unwarranted searches and seizures.

II. BACKGROUND

Between approximately February 2014 and May 2014 the Government was conducting surveillance on 109 E. Gypsy, Hobbs New Mexico. This surveillance was being conducted by a "pole camera" that was placed on a telephone pole approximately 70 yards to the north of the properties of 107 and 109 E. Gypsy, Hobbs. (Exhibit "A").[1] There were no cameras disclosed

[1] "A" is a picture of the telephone pole, or rather light pole in between the buildings where the pole cam was believed to have been mounted.

that were placed on any poles closer to the property of 107 E. Gypsy. (Exhibits "B-1, B-2").[2] This pole camera is believed to have been mounted on the telephone pole surreptitiously, have the ability to record or broadcast in real time and of a very compact form factor. It is also believed to have the ability to at a minimum zoom in on the subject area. The camera is believed to have been located in an area in between two buildings on the poles. (Exhibit "A").

On March 5, 2014 Mr. Cantu was observed walking from his residence at 107 E. Gypsy to 109 E. Gypsy and back. These residences form one continuous property when observed from the street. He was observed "holding what appeared to be a rifle." The agents during "continued observations and with the use of photographs," identified the individual as Ruben Cantu. Reports described him as "attempting to hide" what appeared to be an assault rifle. (Exhibit "C") After conducting a criminal recored check, they determined that Ruben Cantu was a convicted felon. The Agents, to include Hobbs police then sought a search warrant. There was a initial and amended version of this warrant issued. The initial version of this warrant sought only:

> Firearms, including but not limited to handguns, rifles and shotguns. Ammunition used in any firearm. Shell casings rather [sic] fired or unfired. Documentation for any firearms rather that firearm is located on the premises or not. Documentation showing residency of 107 E. Gypsy in Hobbs, NM. *Affidavit for Search Warrant Attachment "B"* .

However, subsequently a second "Amended" search warrant, and affidavit were executed. The second warrant's affidavit had a much longer description, a full page, of items that were to be searched for and included "methamphetamine", money, documentation showing drug transactions, and any electronic device used to make "phone calls, send messages or access the internet." *Amended Affidavit for Search Warrant Attachment "B"*.

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[2] B-1 is a photograph looking north while standing on the property at 107 E. Gypsy. There is a telephone pole that is on the left side of the picture/ property. B-2 is a photograph from 109 E. Gypsy looking north at the telephone pole on the property.

Ultimately, after the search was completed with the warrant or the amended warrant, Ruben Cantu was located on the property and so was an AR-15 Bushmaster rifle.

III. ARGUMENT

1. *Standing and a reasonable expectation of privacy*

A defendant claiming that a search violated his Fourth Amendment rights has the burden of demonstrating that he had a legitimate expectation of privacy in the place that was searched. *See United States v. Talley*, 275 F.3d 560, 563 (6th Cir. 2001). Standing has been broken down into a three factor test in the 6th Circuit that applies in the instant case. In *United States v. Padin*, 787 F.2d 1071, 1075-76 (6th Cir.) the court stated that a defendant's reasonable expectation of privacy does not run solely on the defendant's subjective belief, but also depends upon (1) the defendant's interest in and control of the area searched, (2) any measures the defendant took to ensure privacy, and (3) whether society recognizes the defendant's expectation as reasonable. In the instant case the defendant was "searched" by the pole camera on his property at 107 E. Gypsy, Hobbs New Mexico and therefore presumably had an expectation of privacy in his property and person. None the less, he had ownership and control of the area searched. As stated in the report produced in this case, the defendant was observed "holding what appeared to be a rifle" and he was walking in a manner as "attempting to hide" what appeared to be an assault rifle. Therefore the only question is whether society is prepared to recognize the defendant's ability to walk around in the interior of his property in a manner where he is "hiding" something as reasonable. The undersigned would suggest that the answer is yes as the only way to measure this third prong is how society treats that persons subjective expectation of privacy. The actions of the police and agents suggest that they understood that they would be intruding on his privacy if they had taken other forms of surveillance. There were other closer poles that could have been used, cars that could have been placed on the street (which presumably would have been observed by defendant) and other forms of less secretive surveillance. Here the decision was made not to do that, but rather to place a camera in an alley 70 yards (221 feet) away. However as can be seen by exhibit "D" which is a photograph at the base of the pole, you have to get up high to see anything. This is distinctly different than the cases where aircraft were used to observe actions on properties. *See Dow Chem. Co. v. United States*, 476 U.S. 227, 235-40 (1986)(permitting aerial observation of industrial complex). The actions here were not static or stationary like *Dow* rather, these were the type of long term surveillance that society at all levels finds intrusive as it is believe the observations occurred after an unknown amount of *continuous* surveillance.

2. *Necessity of a warrant*

In the instant case, it is believed that there was not a warrant stating specificity of the need to conduct surveillance of Mr. Cantu or the property located at 107 E. Gypsy. The lack of a warrant in this case would allow the government to conduct surveillance in anyone's backyard without even a threshold determination of probable cause. The placement of the camera in this case appears to be distinctly different than the placement of the camera in the 10th Circuit case of *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000)(upholding warrantless video surveillance). In that case the cameras were described as being placed "overlooking" the residences. Here the camera was placed not on telephone poles overlooking the property, but on a pole in an alley across the street and almost 70 yards from the property itself, or almost one whole football field away from the "target."

Several cases deal with searches conducted via video camera where there was no audio recording. However, they do not deal with the facts as they are believed to be in the instant case. In *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) the Court held while a Title III search has no application to video surveillance, a federal district court has the authority, either under the Federal Rules of Criminal Procedure or by virtue of its inherent powers to issue a warrant for video surveillance and that video surveillance is a search governed by the Fourth Amendment, *Id.* at 877-882. The *Torres* Court upheld the video surveillance search in that case, finding that the government's conformance with the protocol in 18 U.S.C. § 2581(3)(c), the wiretap statute was sufficient to satisfy the requirements of the Fourth Amendment. *Id.* at 882. *See also United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir. 1992); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1437 (10th Cir. 1990); *United State v. Cuevas-Sanchez*, 821 F.2d 248, 252 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 510 (2d Cir. 1986).

In *United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975) the First Circuit suppressed a recorded audio statement where an undercover agent rented a hotel room to be used by the defendant and recording devices were planted in the room and controlled from a remote location. The room was occupied as the defendant's temporary home. *Padilla*, 520 F.2d at 527. Although the government claimed it did not record when the undercover agent was absent, the First Circuit rejected the government's argument that surveillance was constitutionally permitted since it recorded only when the consenting agent was present. The Court concluded that "[w]hen one's confidante leaves his premises, he is left with an expectation of privacy in his surroundings which is not only actual but justifiable [.]" Id. (citing *Katz v. United States*, 389 U.S. 347 (1967). The recordings were suppressed.

In the instant case, Mr. Cantu suggests that the installation of the camera on a telephone pole that was not next to his property, but rather down an alley in a location where it could not provide the same vantage point is distinctly different than rationalizing a camera installed in a location where it could be the same as an individual of the public viewing the same location. (Exhibit "D"). The area around the house is open and easily "defensible." The privacy on the property is almost assured by the fact that while it is in an urban area, the area around the house is vacant properties. Surveillance would be impossible in the surrounding area because the individuals would be out of place and immediately visible. This is presumably the same reason that a pole camera was not placed on the telephone pole at 109 E. Gypsy or the pole next to 107 E. Gypsy. If a pole camera had been placed there, the activity would have been noticed. The fact that the pole camera was placed approximately 70 yards away on a pole in an alley suggests that the government recognized and respected the reasonable expectation of privacy at the property. It is also the reason that surveillance was not conducted from the ground near that pole. The area of interest was not visible unless it was viewed from a far off location monitored by a surreptitiously placed camera at the top of a pole. This in essence allowed the government to trespass onto the properties at 107-109 E. Gypsy and viewed activities that it would not have been allowed to watch without the hidden camera.

IV. Conclusion

In conclusion, the government violated Mr. Cantu's reasonable expectation of privacy when it filmed his property continuously for over one month. Mr. Cantu would respectfully request that the Court suppress the evidence gained in violation of his Fourth Amendment right.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2014, I electronically field the foregoing with the clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsels of record in this cause:

Office of the United States Attorney
555 S. Telshor, Suite 300
Las Cruces, New Mexico 88011.

/s/
BROCK BENJAMIN

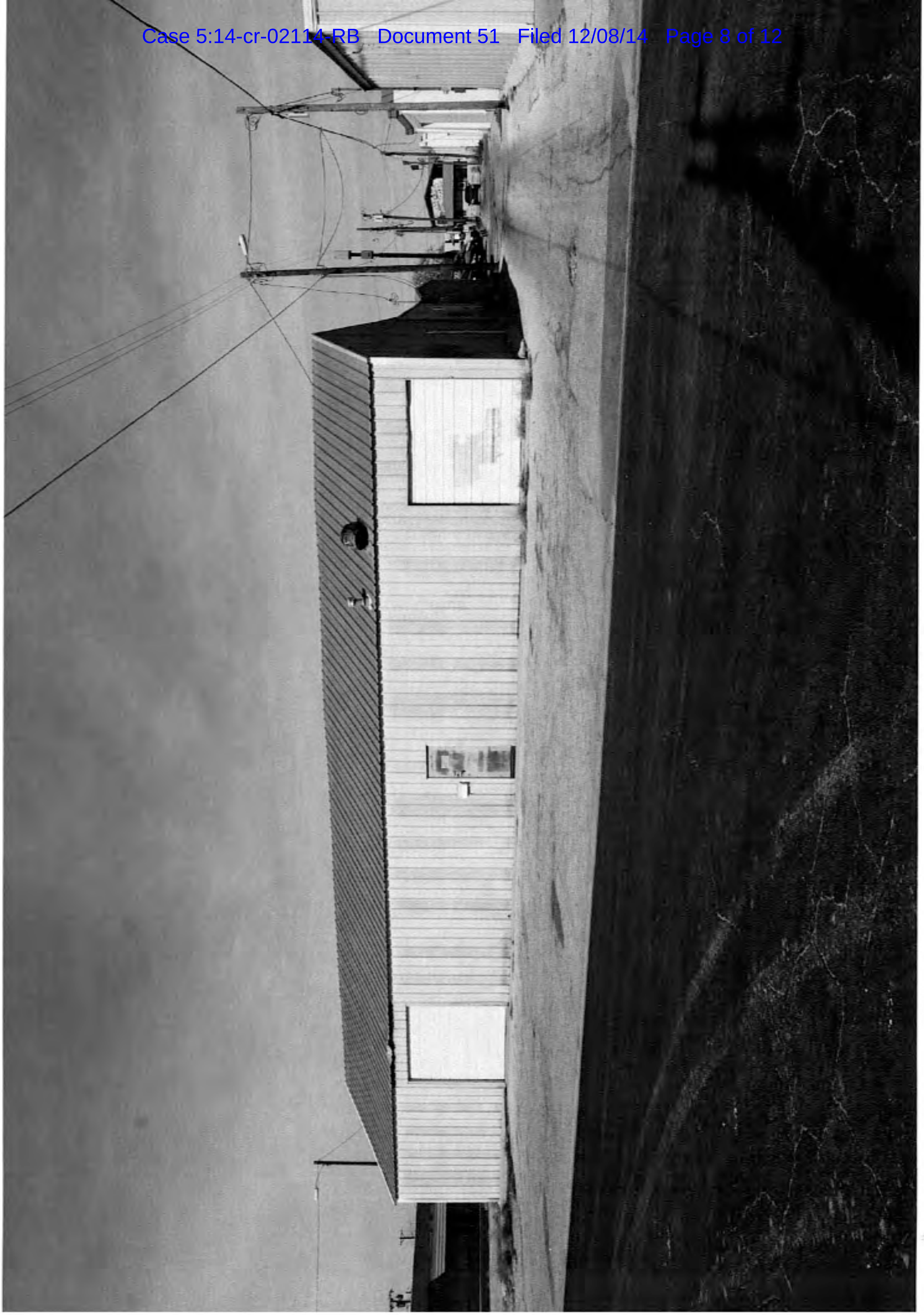

EXHIBIT "A"

EXHIBIT "B-1"

EXHIBIT "B-2"

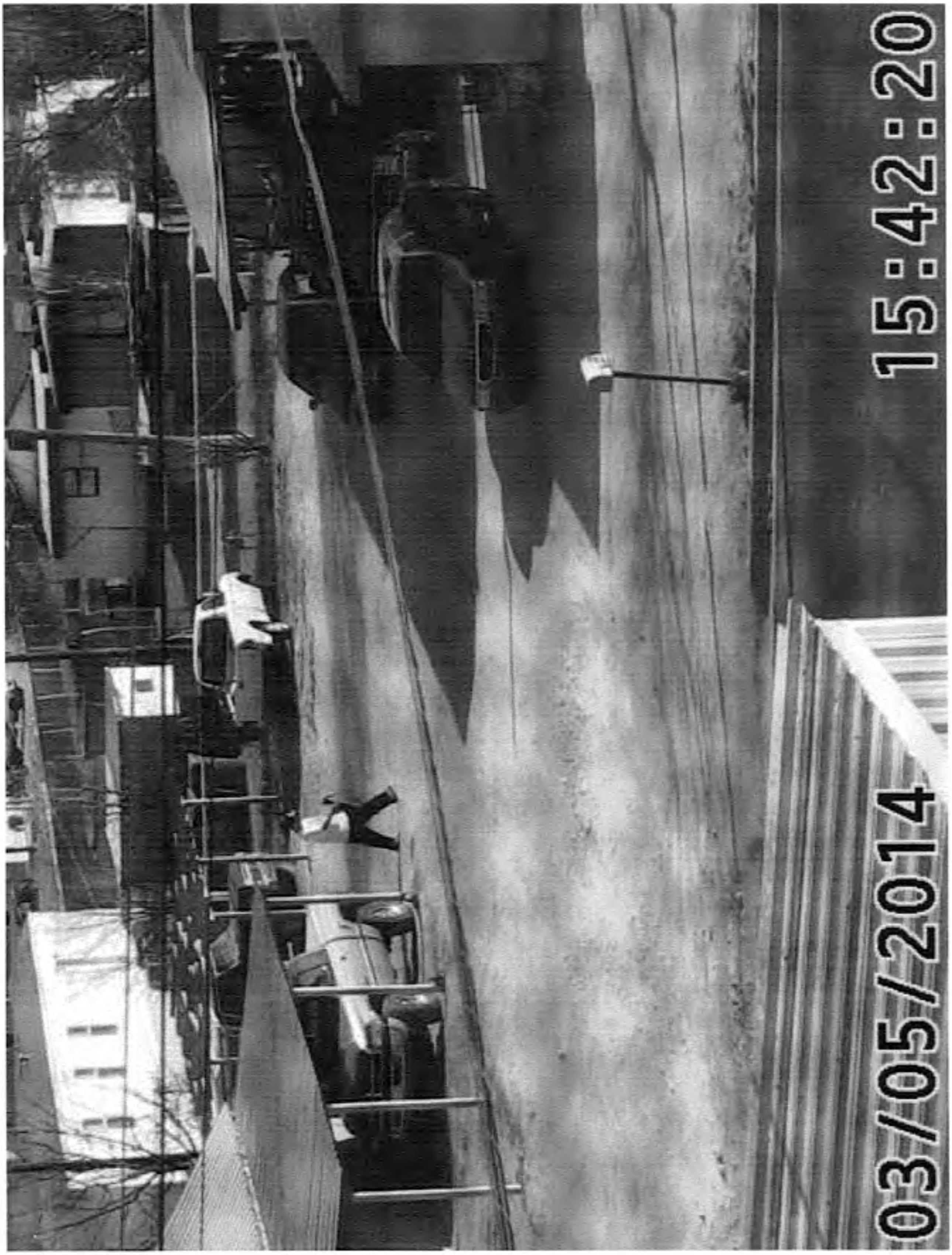
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EXHIBIT "C"

EXHIBIT "D"